executed this proposed sale was clearly subject to contract. The meaning of these words were spelt out by Lord Greene MR. in *Spottiswoode, Ballantyne & Co. Ltd.* v. *Doreen Appliances, Ltd.*[1]:

"... the language here is equivalent to the common and more concise phrase "subject to contract," and, if anything is settled, it is that that phrase is one which makes it clear that the intention of the parties is that neither of them is to be contractually bound until a contract is signed in the usual way."

Merely because the respondents' solicitor agreed to a deletion of one clause in a draft does not, in my view, entitle the applicant's solicitor to say that by doing so he must be taken, on behalf of his clients, to have agreed to all the terms in the contract so that the execution of the document became a mere formality.

There is no evidence whatsoever before me that the respondents had an opportunity of considering all the terms in the final sale agreement before that document was put to each of them for execution.

Consequently it seems to me that this is not a case where the caveator has satisfied me on the evidence presented to this Court that he has a claim to an interest in the land, or that such a claim raised a serious question to be tried, let alone going on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action which the applicant filed on November 29, 1984. (See *Eng Mee Yong & Ors.* v. *Letchumanan*[2].)

In all the circumstances it is clear to me beyond a peradventure that this is not a proper case for the extension of the caveat and it should therefore be removed.

Before leaving this matter there are two other points which I think it pertinent to make. In these modern days of swift communication, *ex parte* applications should be the exception rather than the rule. There was really no reason why the applicant here should not have given notice of his Originating Summons to the respondents' solicitor. If this had been done the Court should have had a benefit of the views of the respondents' solicitor, it being a matter in which they had a real interest.

A second point which needs to be emphasized is that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence. The rules relating to conduct and etiquette in the profession quite clearly say that a solicitor should not appear as such in a matter in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact (see Rule 28 of the Legal Profession (Practice and Etiquette) Rules 1978).

Since this is an *ex parte* application there will be no order as to costs.

Order accordingly.

Solicitors: *Lim & Teng; R.K. Menon & Co.*

OH PHAIK LIN & ORS. v. CHOONG LYE HOCK ESTATE SDN. BHD. & ORS.

[O.C.J. (Edgar Joseph Jr. J.) February 9 & March 1, 1985]

[Penang – Civil Suit No. 315 of 1983]

Probate and Administration – Beneficiaries in conflict – Protecting assets of Estate – Mismanagement – Fraud – Partnership – Contempt of court – Serious questions to be tried – Balance of convenience – Defence of laches and acquiescence – Appointment of receivers and managers.

In this case, the plaintiffs applied by Summons-in-Chambers for the appointment of two interim receivers and managers arising out of a suit involving members of a family who had fallen out. It also involved a company in which they had no interest. The case started on January 4, 1943 when one Chuah Bah Say ("C.B.S.") entered into a written agreement ("the Agreement") with the 1st defendant ("D1"). Under the Agreement C.B.S. was, *inter alia*, to manage and collect rents and profits from various lands known as Otaheite Estate (later called Ayer Itam Estate). He could, with written consent of D1, sell parts of that Estate and proceeds of sales were to be paid to D1. The proceeds of sales and revenue from the lands were to be apportioned as to ¾ thereof to C.B.S. and ¼ to D1 and likewise for all losses. C.B.S. died intestate on November 9, 1949, survived by his widow and three daughters, *viz.* Chor Saw Oon the 2nd plaintiff ("P2"), and Chor Phaik Gnor the 2nd defendant ("D2"), and Chor Phaik Har the 3rd defendant ("D3"). C.B.S. also left his ¾ shares in the said lands alleged to be worth some $90 million From November 10, 1949 until September 10, 1965, D1 solely and later with D2 continued managing the lands. It was alleged that during the period November 10, 1949 to mid 1968, about 15 subdivided pieces of the land were sold at prices below market value by D1 without the prior sanction of the Court. By order of Court dated July 12, 1968 in Penang High Court Civil Suit No. 64/68, the Estate of C.B.S. was placed under court administration. It was alleged there were actions without court sanctions.

There were complaints against the conduct of the defendants, leading to the granting of an *ex parte* court order dated May 18, 1984 whereby the defendants and their agents were restrained from interfering with the affairs of the said Estate. The defendants thus gave up possession of the lands and ceased collecting rents or receiving any income from the ground tenants. It was alleged that in these circumstances there was a vacuum in the administration of the lands. To avoid further injury and loss it was necessary to appoint receivers and managers to act as officers of the court to take possession of the lands and to receive the rentals therefrom.

For the defendants it was said that the Agreement did not evidence a partnership, that the plaintiffs' claims were barred by laches and acquiescences, and that the Estate of C.B.S. could ill afford the appointment of a receiver and manager.

Held: (1) the issues in the suit involving allegations of partnership, charges of fraud, mismanagement and contempt of court are not free from difficulty. They raise serious questions to be tried;

(2) the defendants would suffer no prejudice should an order be made in terms of this application. The balance of convenience lies in protecting the assets of the alleged partnership pending the trial of the action or pending further order;

(3) in the result, regard being had to the above factors and the circumstances of the case as a whole, the learned judge exercised his discretion by making an order in terms of the application, omitting the word "partnership" therein since that is a question to be determined at the hearing. Costs to the plaintiffs.

Cases referred to:

(1) *Wood* v. *Hitchings* 2 Beav. 289; 48 E.R. 1192
(2) *Federal Transport Service Co. Ltd. & Ors.* v. *Abdul Malik & Ors.* [1973] 1 M.L.J. 216, 219.
(3) *Ong Heok & Anor.* v. *Ooi Bee Tat & Ors.* [1982] 2 M.L.J. 326, 331.
(4) *Re Lister* 6 T.L.R. 160.
(5) *Mollwo, March & Co.* v. *Court of Wards.* (1872) L.R. 4 P.C. 419.
(6) *Steward* v. *Blakeway* (1869) 4 Ch. App. 603.
(7) *Floydd* v. *Cheney* [1970] Ch. 602.
(8) *Tucker* v. *Prior* (1887) 31 S.J. 784.
(9) *Longbottom* v. *Woodhead* (1887) 31 S.J. 796.
(10) *Tate* v. *Barry* (1928) 28 S.R. (NSW) 380.

SUMMONS-IN-CHAMBERS.

Gan Teck Chee for the plaintiffs.
Lim Ewe Hock (*Lim Kean Chye* with him) for the 1st defendant.
Andrew Lim for the 2nd defendant.
K. Balasundaram for the 3rd defendant.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This application for the appointment of two interim receivers and managers arises out of a suit involving members of a family who have fallen out. However, it also involves an incorporated company in which they have no interest.

In order to understand what their quarrel is about it is necessary to set out in some tedious detail, the sequence of events which caused matters to come to a head.

The case has a long and chequered history, the starting point being, January 4, 1943, when one Chuah Bah Say ("C.B.S.") entered into an agreement in writing of that date ("the agreement") with Choong Lye Hock Estate Limited later renamed Choong Lye Hock Estate Sendirian Berhad (the first defendant – "D1" for short).

As the suit herein arises out of the agreement, it is necessary to set out its main provisions. They were these:

1. C.B.S. was, without renumeration, to manage various lands described in the agreement and known collectively as Otaheite Estate (later called Ayer Itam Estate) and was to collect all the income, rents and profits accruing therefrom and account for the same to "D1" (Clause 3).

2. C.B.S. was authorised to sell such part or parts of Otaheite Estate as he deemed fit but he had first to obtain the written consent of "D1" (Clause 4).

3. The proceeds of such sales were to be paid to D1, as also the nett income, rents and profits aforesaid (after deducting certain specified interest payments, expenses and costs).

4. The proceeds of such sales and the revenue derived from the lands were to be apportioned as to three-fourths thereof to C.B.S. and one-fourth to D1. Similarly, all losses (if any) were to be shared between them in like manner (Clause 6).

5. All references to C.B.S. were to mean and include his personal representatives and, similarly, references to D1 were to include their assignees (Clause 7).

The agreement was duly implemented but, in the events which transpired, C.B.S. died intestate on November 9, 1949 and left surviving him his widow Oh Kee Lee ("O.K.L.") and children who included three daughters, namely, Chor Saw

Oon (the second plaintiff – "P2" for short), Chor Phaik Gnor (the second defendant – "D2" for short) and Chor Phaik Har (the third defendant – "D3" for short).

But C.B.S. also left his three-fourths share in the lands aforesaid which, it was alleged, are worth some $90,000,000 (ninety million dollars). This, of course, means that O.K.L. and each of her children have a significant beneficial interest in the Estate of C.B.S.

Letters of Administration to the Estate of C.B.S. were granted on March 19, 1954 in favour of D2 and one Chor Sin Keng ("C.S.K."), a son of C.B.S., and together with "D1", they continued the implementation of the terms of the agreement.

Then, on September 11, 1965, C.S.K. died thus leaving D2, the sole surviving administrator of the Estate of C.B.S.

Next, on December 7, 1959 "O.K.L." died testate and the present plaintiffs (P1, P2, P3") were appointed the executors and trustees of her estate.

Thereafter, from November 10, 1949, until September 10, 1965, D1 solely, and subsequently with D2, continued managing the lands. It was also alleged that in 1964 D2 was appointed manageress by D1.

More importantly, it was alleged that during the period from November 10, 1949 to mid-1968, about 15 subdivided pieces of the land were sold at prices below market value by D1 without the prior sanction of the court.

This led, it was said, to the Order of Court dated July 12, 1968 made in Penang High Court Civil Suit No. 64/68 whereby the Estate of C.B.S. was placed under court administration, the effect of which was that all transactions affecting the estate, other than for winding up and distribution, could only be carried out with the prior sanction of the court.

It was further alleged that, despite this, in 1968, D1 appointed one Guan Siang as general clerk and, in 1970, one Swee Hock as supervisor in the administration of the lands. Then, in 1975, it was alleged that D1 and D2 appointed D3 as manageress of the lands without the sanction of the court.

Complaint has also been made that D1 and D2 have been accepting numerous ground tenants (specified by name) occupying in all about 250 low-cost premises including about 100 extensions and outhouses on the lands at low premiums without prior sanction of the Court thus causing waste and *devastavit* to the Estate of C.B.S.

Similar complaints have been made against D3 who, acting with D1, was alleged, since 1975, to have been accepting ground tenants (specified by name) on the lands and they occupy about 220 block-plan premises including extensions and outhouses without prior court approval. It has also been alleged that she had been receiving secret profits for her own benefit in respect of transactions effected by her as manageress.

Insofar as D1 is concerned, it was alleged that between 1969 and 1980, it undertook to surrender substantial portions of the said lands (in which the Estate of C.B.S. had a beneficial interest) to the Local Authority for use as access roads and drains in various adjacent housing developments for inadequate consideration, without even the knowledge of the beneficiaries of the Estate of C.B.S. except of course, D2 and D3.

This led, it was said, to an application to court, made by the plaintiffs, which resulted in an *ex parte* Order of Court dated May 18, 1984 whereby the defendants by themselves, their members, servants or agents were restrained, until further order, from interfering in any way with the affairs of the said Estate. Whereupon, the defendants gave up possession of the lands and ceased collecting rents or receiving any income from the ground tenants.

In these circumstances, it was alleged that there is a vacuum in the administration of the lands. Accordingly, it was urged on the authority of *Wood* v. *Hitchings*,[1] *Federal Transport Service Co. Ltd. & Ors.* v. *Abdul Malik & Ors.*[2] and *Ong Heok & Anor.* v. *Ooi Bee Tat & Ors.*[3] that to avoid further injury and loss it was necessary to appoint two interim receivers and managers to act as officers of the court to take possession of the lands and to receive the rentals arising therefrom. The names of two gentlemen, whose character and standing have been vouched for, have been proposed as interim receivers and managers, subject to the giving of security and the usual other conditions.

So much for the case for the plaintiffs.

On the other hand, the case for the defendants, as gleaned from the Defences filed and the submissions of their counsel, may be stated thus:

1. The agreement evidenced not a partnership but showed that two co-owners had agreed to hold the lands and to sell them at their convenience, the proceeds to be shared in proportions corresponding to their respective shareholdings.

It was strongly argued that there was no case at all for a partnership since the relevant accounts (produced by the defence), being Exhibit 4 annexed to Enclosure 50, studiously omitted any mention of the lands as a fixed asset. The case of *Re Lister*[4] was cited in support. It was pointed out that both the signatories to the agreement who alone would have personal knowledge as to this issue had long since died and their successors in title and or their assignees were far too young at the material time to know; for this reason, the accounts, although originating from the defence, were a contemporary record, unchallenged since 1968 and thus vitally important.

In the result, it was said that although the sharing of profits was a strong indication of a partnership (see *Mollwo, March & Co.* v. *Court of Wards*[5]), this was open to rebuttal (see *Stewart* v. *Blakway*[6]) and the court should find, "on the spot", that the accounts were more than sufficient for this purpose. Accordingly, it was urged that D1 as co-owner of an undivided ¾ share in the lands was entitled to let anyone into it.

2. Then it was said that there was inordinate delay and inaction on the part of plaintiffs in prosecuting their claim, the writ herein having been issued as late as June 2, 1983.

Moreover, the plaintiffs had shared in the revenue which accrued from the alleged wrongful lettings and could hardly now complain of any wrongdoing on the part of defendants on this score.

Accordingly, it was submitted that the plaintiffs' claims were barred by *laches* and acquiescence and so the court should decline the relief prayed for in the application now before it.

3. A final point was urged by counsel for D3 that the Estate of C.B.S., whose income was limited to collecting ground rents, could ill afford the appointment of a receiver and manager as this would entail a recurring expenditure of $2000 (two thousand dollars) per month.

On the central issue of partnership or no partnership, it was submitted by Mr. Gan, for the plaintiffs, and I agree, that the single fact of the omission from the accounts (tendered by the defence) of the lands as a fixed asset, whilst most material, does not conclude the matter. This would have to be considered in context, that is to say, along with the other connected documents (if any) and the surrounding circumstances as a whole, to be fully explored at the final hearing when there will be ample opportunity for cross-examination.

On the question of alleged delay, I had occasion to ask counsel during the argument, as to when it was that the plaintiffs' claim to a partnership was first made and resisted. Mr. Lim Ewe Hock, who appeared with Mr. Lim Kean Chye for D1, replied that the claim and denial to a partnership were first made in the pleadings. If this is so, I fail to see any delay sufficient to debar the plaintiffs from obtaining the relief they now seek by this application provided, of course, I am satisfied that there are grounds for granting the same.

On the question of laches and acquiescence, it is relevant to ask: When did the plaintiffs first come to know of the defendants alleged wrongdoing? There can, of course, be no question of acquiescence or laches without specific knowledge of material facts (see *Halsbury* 4th edn. Volume 16 paragraphs 1473 to 1474, 1478). This is just one example of an issue which arises on this part of the case by reason of the plaintiffs' Reply. There may well be others.

Clearly, the question whether the plaintiffs' claims are barred laches and acquiescence can only be determined at the final hearing and not just on affidavits.

On the final point as to whether the Estate of C.B.S. can afford the appointment of receivers and managers, Mr. Gan pointed out that according to the accounts tendered by the defence (see Enclosure 50 Page 3) there was no less than $437,670 (four hundred and thirty-seven thousand six hundred and seventy dollars) due to the Estate of C.B.S. There was also revenue to the tune of $8000 (eight thousand dollars) per month to be derived from rentals paid by ground tenants. In these circumstances, I see no insuperable problem on grounds of expense alone.

I have set out the rival arguments of counsel, which incidentally occupied some four hours, to demonstrate one cogent fact and that is this: the issues in the suit, involving as they do, an allegation of a partnership, charges of fraud, mismanagement and contempt of court are not free from difficulty and can only be resolved at the final hearing when there will be full discovery and opportunity for cross-examination. In other words, they raise serious questions to be tried.

I now come to my conclusions.

In considering the application, I have kept in the forefront of my mind the judgment of Megarry J. (as he then was) in *Floydd* v. *Cheney*.[7]

In that case, the learned Judge rejected *Tucker* v. *Prior*[8] which held that an interim receiver will not be appointed where the existence of a partnership is in question. He next referred to the exception to this rule when the court will make the appointment if the "assets are in danger" (see *Longbottom* v. *Woodhead*[9]) and then referred to and concurred with the following passage in the judgment of Long Innes J. in *Tate* v. *Barry*[10] at page 387:

"... that there is no such rule of practice as is now suggested, and that the denial of an alleged partnership is merely one of the factors to be taken into consideration in each case, and does not, of itself, debar the Court from appointing a receiver until that issue is determined; but it may well be that where the partnership is denied, the Court, having regard to the serious consequences entailed by the appointment of a receiver, will be reluctant to appoint a receiver in a case where such appointment would inflict irreparable injury upon a defendant who might succeed at the hearing, or where adequate protection can be otherwise afforded to the plaintiff."

Applying the above guidance given by Megarry, J. and, proceeding by the appropriate stages, I have put to myself and answered the following questions:

1. Q: What is the general approach to an application such as this where a partnership is alleged on one side and denied on the other?

A: Two principles must be kept in mind and these are:

(a) A denial of partnership is merely one of the factors to be taken into consideration but by no means a decisive one.

(b) However, the court should be slow to appoint an interim receiver or manager where the defendants would suffer or there is at least a possibility that they would suffer irreparable or serious injury should they succeed at the final hearing or where adequate protection can otherwise be afforded to the plaintiff.

2. Q: Would the defendants in this case suffer or is there at least a possibility that they would suffer irreparable or serious injury should the appointment of a receiver be made and they succeed at the final hearing in demonstrating that there was after all no partnership?

A. There is no evidence of this.

I might add that it was alleged by counsel for the plaintiffs, and not challenged by counsel for the defendants, that the defendants would suffer no prejudice should an order be made in terms of this application.

3. Q: Has any or any adequate protection been offered by the defendants to the plaintiffs in lieu of the appointment of receivers or managers?

A: There is no evidence of this.

4. Q: Where does the balance of convenience lie?

A: It lies in protecting the assets of the alleged partnership pending the trial of the action or pending further order.

In the result, regard being had to the above factors and the circumstances of the case as a whole, I exercised my discretion by making an order in terms of this application but, omitting of course, the word "partnership" therein since that is a question which can only be determined at the final hearing.

The defendants will have to pay to the plaintiffs the costs of this application and I am now prepared to hear arguments as to any consequential orders that may be necessary.

Order accordingly.

Solicitors: *Gan Teck Chee & Ho; Lim Kean Chye & Co.; Lim Cheng Poh & Lim.; Balasundaram & Co.*